IN THE

Supreme Court of the United States

October Term 1950.

No. 297.

Kiefer-Stewart Company, *Petitioner*,

v.

Joseph E. Seagram & Sons, Inc., Seagram-Distillers Corporation, The Calvert Distilling Company and Calvert Distillers Corporation, *Respondents*.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER.

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JURISDICTION AND STATUTES INVOLVED

This is a treble damage proceeding brought under the antitrust laws of the United States (15 U. S. C. §§ 1, 15). The judgment of the District Court was entered on June 27, 1949 (R. 360). The judgment of the Court of Appeals for the Seventh Circuit reversing the judgment of the District Court and ordering the cause remanded to the District

Court with directions that the cause of action be dismissed, was entered on May 9, 1950 (R. 413). On May 24, 1950, petitioner filed a timely petition for rehearing (R. 414), which was denied on June 13, 1950 (R. 420). The petition for certiorari was filed September 9, 1950, and was granted October 23, 1950 (R. 426). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is lawful under the antitrust laws for competing manufacturers and distributors in interstate commerce to combine and conspire to control the margins of wholesale profit by enforcing maximum or ceiling prices to which all the wholesalers of their products must conform.

2. Whether an appellate court should be permitted to reject the verdict of a jury finding the existence of a combination or conspiracy in violation of the antitrust laws, based upon such facts as identical action taken by two competing sellers under common control in fixing and coercing absolute or even maximum resale prices, together with sworn statements on the part of such competitors that conferences between them were held concerning such concert of action and admissions by one of them that the identical action was taken due to pressure exerted by the other members of the conspiracy.

3. Whether this Court, having the power so to do, should not finally dispose of this litigation (*Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555) since: (i) The record presents an important question of law decided in dicta by the Court of Appeals concerning petitioner's eventual right to recover in view of the defense asserted by respondents concerning petitioner's alleged participation in a claimed separate conspiracy of Indiana wholesalers; (ii) The few remaining assignments of error present simple legal issues which may be readily disposed of by this Court; and (iii) The traditional policy of this Court is to terminate protracted litigation when, upon the record and issues presented, it is possible to achieve this end.

STATEMENT

This action was brought in the United States District Court for the Southern District of Indiana under Title 15 U. S. C., Section 15, to recover damages alleged to have been sustained by the petitioner as the result of violations by defendants of Section 1 of the Sherman Act and Section 7 of the Clayton Act (15 U. S. C., Secs. 1 and 18). The gravamen of petitioner's action was that as a proximate result of a conspiracy between the respondents Seagram and Calvert to fix the resale price of their products, the petitioner, a wholesale distributor, had been deprived since November, 1946, of a continuing supply of Seagram and Calvert whiskies and other liquors, with consequent large damage to its business (R. 2).

The case was tried to a jury and submitted by the District Court on the issue whether the respondents had conspired to fix the resale prices for their products (R. 266-7). The court instructed the jury with respect to that issue: (i) That under the law a contract or a conspiracy to fix prices is illegal in itself as a restraint of trade and detrimental to the public interest; (ii) That if the jury found from a preponderance of the evidence that defendants entered into a conspiracy to fix their resale prices, such contract was illegal; (iii) That the jury need not consider whether prices so fixed were reasonable or unreasonable, or whether the price-fixers controlled the market, or that some desirable ends were served, but that:

> "Combinations or conspiracies which fix prices constitute unreasonable restraints of trade whether for the purpose of raising, lowering, pegging or stabilizing the prices of goods sold in interstate commerce." (R. 267)

Upon these and other instructions, and upon the evidence before it, the jury found for the petitioner, assessing damages at $325,000.00 (R. 279), which the Court trebled in its judgment (R. 360).

Respondents appealed to the Court of Appeals for the Seventh Circuit (R. 361-362), which on May 9, 1950, reversed the judgment of the District Court, with directions that the judgment be vacated and the cause of action dismissed (R. 413).

The Parties

The respondents are Joseph E. Seagram and Sons, Inc. (referred to in the opinion below as "Seagram (Indiana)") and its wholly-owned sales subsidiary Seagram-Distillers Corporation (referred to as "Seagram Sales") and The Calvert Distilling Company (referred to as "Calvert") and its wholly-owned sales subsidiary Calvert Distillers Corporation (referred to as Calvert (Sales)).[1] Seagram (Indiana) and Calvert distill, rectify and bottle, respectively, the Seagram line of spirit-blend whiskies, (i.e., a blend of straight whiskey with neutral spirits, R. 282), including Seagram's 7-Crown, Seagram's 5-Crown and Kessler's Private Blend, and the Calvert line of spirit-blend whiskies, including Lord Calvert, Calvert Reserve and Calvert Special. (Plaintiff's Exhibits No. 5, 7, R. 77, 291, 293). Seagram (Sales) and Calvert (Sales) distribute the respective lines of spirit-blend whiskies in interstate commerce to wholesale or other outlets throughout the United States (R. 281). Since 1945, Seagram (Indiana) has owned all of the common stock of Calvert (R. 284).

Seagram and Calvert companies are the leading sellers of spirit-blend whiskies in Indiana (R. 35). They maintain their general offices on the same floor in the Chrysler Building in New York (R. 41). Despite their affiliation, Seagram and Calvert products have always been separately marketed under distinctive trade names (R. 376, 390) and no connection between the Seagram and the Calvert companies is disclosed in their advertising. (R.

[1] The opinion below also sometimes collectively refers to the Seagram defendants as "Seagram" and to the Calvert defendants as "Calvert", which designations are adopted herein.

386, 392). A principal officer of all four of the companies testified that Seagram and Calvert are "really competitors" (R. 152).

Petitioner, Kiefer-Stewart Company, is a long-established Indiana wholesale drug concern which, since its organization and except for the period of Prohibition, has been engaged in the wholesale liquor business (R. 31-32). In 1946, before the acts complained of, it was the leading wholesale liquor distributor in the State of Indiana, having a volume of liquor sales of approximately $11,000,000, 15% or 16% of the total sales in the State (R. 34). At the time of trial (May, 1949), petitioner's sales had declined to approximately $3,000,000, or about 6% of the State's total (R. 34).

Background of the Conspiracy.

Beginning in 1934, after Prohibition, the petitioner became a distributor for Seagram products in the State of Indiana, offered the Seagram line to every retail liquor permittee in the State of Indiana, and obtained approximately 2,400 placements in about three years, which constituted about 69% of the retail liquor permittees of the state (R. 34). By 1938, Seagram had attained leadership in the sale of spirit-blend whiskies in the State of Indiana (R. 35). Since the beginning of the war, spirit-blend sales have amounted to 80% of total whiskey sales in Indiana (R. 33). Calvert's sales volume in Indiana was less than Seagram's and, in 1942, Calvert's Indiana representative told petitioner that Calvert's distribution in Indiana was wholly unsatisfactory and sought petitioner's services as a distributor of its products in Indiana (R. 36).

World War II brought about a cessation of the distillation of grain into whiskey from October 8, 1942 until November of 1945 (R. 282). Aged whiskey inventories were in short supply and spirit-blend whiskies became increasingly important in the market (R. 33). From October 1942, Calvert Sales and Seagram Sales sup-

plied even their spirit-blend whiskies to their customers on an allocation basis (R. 282).

As the result of O. P. A. price regulation during World War II, the wholesalers' mark-up of 17½% on over-all costs was reduced to a mark-up of 15% of costs, excluding from the cost basis, however, new federal and state taxes enacted after November 2, 1942. (Maximum Price Regulation 445, R. 284; R. 42). In 1944 and 1945, respectively, a new federal tax of $3.00 per proof gallon and an Indiana state tax of $1.00 per wine gallon were imposed (R. 43, 284). The gross profit to Indiana wholesalers on whiskey sales was reduced under this O.P.A. regulation from 13.04% to 10% on the selling price (R. 43, R. 284).

In July 1946, when it appeared that price regulation would end, petitioner determined that, upon the expiration of controls, it would return to the previous method of applying its percentage mark-up (15%) to total costs, but with an allowance of freight on out-of-town deliveries, which had not been granted when the 17½% mark-up was in effect prior to O. P. A. (R. 43-4).

On October 23, 1946, O. P. A. regulation of liquor prices terminated (R. 284). The petitioner again reviewed its prior determination to apply its 15% mark-up to all costs and determined to prepare new price lists on such basis, as required by the Indiana Alcoholic Beverage Commission (R. 44). Before it had done so, on October 31, 1946, a luncheon meeting of the Indiana Wholesale Liquor Dealers Association was held (R. 44).

At the meeting, Merton A. Johnston, Trade Relations Director of the Indiana Alcoholic Beverage Commission, with a member of the Commission and a Deputy Attorney General assigned to the Commission present (R. 189), requested an opportunity to speak to the Association on the new method he wished employed in posting their prices (R. 187). He was interested in eliminating the cumbersome O. P. A. pricing method in posting prices with the

Commission (R. 187).[2] He wanted and asked a return to the pre-war O. P. A. method of applying a given mark-up to over-all costs, the method for which the Commission's forms had been designed (R. 187-188). Johnston also advised the wholesalers present that he would accept and approve new over-all mark-up filings made by letter announcing what the over-all mark-up was to be (R. 187). Mr. Johnston stated that the Commission wanted all of the wholesalers "to move off at the same time," and that it would not have been possible to check detailed price postings by all Indiana wholesalers at one time (R. 188).

On the same occasion, petitioner's President announced its previously determined intention to apply its existing

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[2] The O. P. A. method of determining the wholesaler's price to retailers is illustrated by reference to Plaintiff's Exhibit No. 5 (R. 77, 291, 285-6). The Seagram (Indiana) price filing shows the following with respect to a case of Seagram 7-Crown (4/5):

F. O. B. Distilling price, including Federal Tax	$30.08	(Col. 1)
Freight	.35	(Col. 2)
State Tax	5.00	(Cols. 3 and 4)
Wholesaler's Cost	$35.43	(Col. 5)

In order to arrive at the retailer's cost (Col. 6) it is necessary to:

(a)	Deduct $3.00 per 100-proof gallon (the Federal Tax increase) = 2.4 gal. (no. wine gal. per case of 4/5) x $3.00 (Fed. increase) x 86.8% (proof)	$6.25	
(b)	Deduct $1.00 per wine gallon (Indiana Tax increase) = 2.4 gal. (no. wine gal. per case of 4/5) x $1.00 (Ind. increase)	2.40 =	—8.65
	Wholesaler's Cost exclusive of Tax Increases		$26.78

And to:

Add 15% mark-up (26.78 x .15)	4.02	
Add deductions from cost a/c tax increases	8.65	
Wholesaler's Price to Retailers	$39.45	(Col. 6)

15% mark-up to its over-all costs (R. 47-8), and petitioner on November 1, 1946, filed a letter with the Indiana Alcoholic Beverage Commission stating such intention (Defendants' Exhibit No. 8, R. 166, 308). Other wholesalers filed similar letters (Defendants' Exhibits 1-22, R. 163-166, 299-307, 309-322).

Petitioner's change in its own mark-up, however, came in conflict with a policy decided upon by Seagram (Sales) as to the prices to be charged by its customers. Fischel, Vice President of Seagram (Sales), shortly before O. P. A. regulation expired, decided that the distributors of Seagram products should adhere to the former O. P. A. system of pricing (R. 201-2, 204). To achieve this end Seagram (Sales) sent a telegram to all its distributor-customers throughout the country stating this policy and asking the immediate assurance of full cooperation from each distributor—not only for himself but for his customers—and information as to the steps being taken by each distributor to carry out the Seagram policy (R. 393). Fischel testified at the trial that they did not insist after O. P. A. went out of existence that customers use the same price, but later said (R. 204):

> "I issued instructions that anybody that raised the price of Seagram would not get any further shipments of Seagram's and if they did that, they would no longer be a Seagram distributor."

Petitioner had already filed its intention to change prices, effective November 6, 1946, and refused to follow the Seagram dictation. Since the latter part of October, 1946, the petitioner has not received any shipments of Seagram whiskies (R. 48).

On October 22, 1946, at a convention of the Indiana wholesalers at French Lick, Indiana, Calvert again (as in 1942 and 1943) offered petitioner a Calvert distributorship (R. 37, 79-80, 107). Calvert offered a thousand cases a month, as a starter with an increased supply promised as

soon as it could be obtained (R. 37-38, 108). The petitioner did not accept the proposition thus made but expressed its interest if Calvert could obtain additional merchandise (R. 80, 108).

On November 5, Calvert representatives arranged another meeting with petitioner with reference to a distributorship of Calvert products (R. 80, 108). At this meeting, Calvert stated that it had been able to obtain 2,000 cases of Calvert merchandise a month if petitioner would go along; and petitioner stated its willingness to become a distributor if Calvert could increase the amount within a short period (R. 80-81, 108). At this meeting, the pending price change by petitioner was discussed and Calvert's Division Manager Schwalb stated that the price change would hav no effect on Calvert shipments of merchandise. "He said that regardless of what Seagrams did in Indiana that Calvert was going through with this order with Kiefer-Stewart due to the fact that they wanted to get in this market in a big way and this was their opportunity." (R. 108, 81)

On November 12, the same Calvert representatives again met with representatives of petitioner. Calvert requested that petitioner arrange, and petitioner did arrange, a large meeting of petitioner's salesmen and Calvert executives on November 23, 1946, to introduce the Calvert line, by which time Calvert merchandise was to have been delivered to petitioner (R. 81, 109). At this meeting, the subject of the suspension of Seagram shipments to Indiana was brought up, and Calvert's Indiana Manager stated to petitioner that "they were still wanting to go along." (R. 82) Mr. Gollin, Assistant General Sales Manager of Calvert, was called on the telephone, and told petitioner that

> "* * * the Seagram situation was going to make no difference. He was going to personally guarantee that the merchandise would be out here and for us to go along and make arrangements for the sales meeting." (R. 82)

Under date of November 13, 1946, Calvert (Sales) executed an official form of the Alcoholic Beverage Commission designating its authorized distributors in Indiana, and required to be signed by an official authorized to bind the company. Such list of distributors, including the name of petitioner, was stamped as received by the Auditing Department of the Indiana Alcoholic Beverage Commission on November 16, 1946. Petitioner's name was stricken out, presumably at some later date (Plaintiff's Exhibit No. 10, R. 78, 297-298).

The Conspiracy Found by the Jury

On November 19, 1946, the Calvert companies notified petitioner that they would not make any shipments of Calvert products to petitioner (R. 39-40). In notifying petitioner's President that Calvert was not going through with its commitments, Calvert's Division Manager in Chicago, who had negotiated the arrangements just one week before, stated that Calvert was:

> "* * * going along with Seagram on their sales policy. We are terribly sorry but we have to go along with Seagram." (R. 40)

Petitioner's President immediately telephoned Calvert's General Sales Manager in New York, who stated that Calvert would have to withdraw from the arrangement because it:

> "* * * had to go along with the other side of the house." (R. 41)

The two Calvert officials denied these admissions (R. 221, 240), and even claimed that petitioner's President was neither told nor did he ask why Calvert was calling off the deal (R. 221).

In sworn answers to interrogatories, addressed to Seagram and Calvert, they admitted that they had, between November 6, 1946 and February 3, 1947, conferred with

respect to the delivery or non-delivery of products to petitioner (R. 379, 383, 391-2). Such sworn answers designated the persons so conferring as Samuel and Allen Bronfman of the Canadian parent corporation (Distillers Corporation-Seagram, Ltd.), Fischel of Seagram (Sales), Schwengel of Seagram (Indiana), Wachtel and Reznik of Calvert, and Friel, an officer of all four respondents, but stated that the respondent was unable to give any specific dates of any such conferences (R. 379, 383, 391-2).

Fischel, the first of respondents' officials to testify, repeatedly denied on the witness stand that he had ever discussed with Calvert the matter of deliveries of whiskey to Indiana or to petitioner, or that he even knew that Calvert had not shipped when the suit was filed (R. 208-210). This denial continued even when the witness was confronted with the sworn answers to interrogatories of his company to the contrary (R. 209, 213). Later he returned to the stand and claimed that by his previous unqualified denials he had intended to refer to conferences before November 6, 1946, and that he had a single conference with Friel, a common officer of Seagram and Calvert. Calvert's President thereafter testifying took the position that if Friel's sworn answer for his company said there were conferences "before the act" he would repudiate it, but that if he said they were "after the act" he would accept it—that conferences were "not necessary" before because he decided his own policy; that Seagram and Calvert "don't discuss their policies" but "exchange information" after the act (R. 232-33).

Calvert's President further testified that Calvert withheld shipments to Indiana until wholesalers maintained the prices at which they had previously sold "which was the established price and had been for years" (R. 231-2). Seagram (Indiana's) President, while shipments were being suspended to petitioner, stated to petitioner that Seagram (Indiana) was insisting on sales at no other price than the O. P. A. price (R. 68). Seagram (Sales) Indiana

representative testified that Seagram was not going to ship any liquor into Indiana until all distributors "went along with our program." (R. 196)

On February 3, 1947, Fischel of Seagram held a meeting with certain Indiana wholesalers whom he had invited to Chicago, the group being limited to those who had filed new prices, presumably acceptable to Seagram (R. 84). Petitioner was not invited to the meeting but the head of its liquor department, Lutz, attended on instructions of petitioner's President (R. 89). Immediately after such meeting—when "the distributors here finally saw the light of day" (R. 254)—the Calvert and Seagram companies commenced shipping their whiskey to other Indiana wholesalers but neither Calvert (Sales) nor Seagram (Sales) ever thereafter shipped any of their products to the petitioner (R. 205, 243-4), but continued to boycott petitioner after they had resumed relations with all other Indiana wholesalers.

Seagram and Calvert each adopted an allocation system during the war years, while their products were in short supply (R. 199, 282). This quota arrangement was abandoned by both respondents when supplies became more abundant in 1947 (R. 208, 282). This change of sales policy coincided in general with the action taken by Seagram and Calvert in making fair trade contracts with Indiana wholesalers. These contracts required that wholesalers maintain minimum resale prices which were specified in price schedules concurrently filed with the Indiana Alcoholic Beverage Commission (Plaintiff's Exhibits Nos. 3-7, R. 76-77, 287-294).

These schedules fixed as the minimum resale prices the identical prices which respondents had insisted upon as the maximum prices in November of 1946. Thus the maximum of November, 1946 became the minimum after shipments were resumed in 1947. An inspection of the Seagram and Calvert schedules reveals that these respondents have followed identical pricing policies from the distillery

through to the consumer with respect to their principal products. The prices of Seagram's 7-Crown and Calvert's Reserve, their more expensive lines, are identical, as are the prices on their cheaper lines, Seagram's 5-Crown and Calvert's Special (R. 291, 293).

THE OPINION OF THE COURT OF APPEALS.

The opinion of the Court of Appeals is officially reported at 182 F. (2d) 228 and appears in the record at page 399. It held (i) that the evidence was not sufficient to show that the respondents "acted in concert or as a result of conspiracy" (R. 409); (ii) that, even assuming that respondents acted in concert, their agreement amounted only to a determination of a maximum price above which their products could not be resold, with the wholesaler being "free to fix any price which it saw fit within the maximum limitation" (R. 410); and (iii) that the restriction thus imposed by respondents was not in restraint of trade and that the language of this Court in *U. S.* v. *Socony-Vacuum Oil Company, Inc.*, 310 U. S. 150, condemning, as illegal *per se*, agreements "to raise or lower prices" and "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity," constituted *dicta* under the facts of that case and was inapplicable to this cause (R. 411-412).

SUMMARY OF ARGUMENT.

I. The Court of Appeals erred in holding that there was not sufficient evidence, by inference or otherwise, to prove that Seagram and Calvert acted in concert or combination; and in holding, to the contrary, that the evidence indicated they each pursued an independent course [182 F. 2d at p. 234 (R. 404)].

The proof showed: close corporate affiliation between respondents; that Seagram determined to maintain former O.P.A. prices after the termination of price control and punished petitioner for refusing to adhere to such prices

by suspending shipments; that Calvert, admittedly a Seagram competitor and aware of the Seagram price policy, determined to expand its Indiana distribution with petitioner as a distributor, without any indicated desire to control petitioner's resale prices; that conferences were held between Seagram and Calvert at which the question of supplying products to petitioner was discussed; that Calvert over-night reversed its attitude toward petitioner, by suspending shipments and canceling petitioner's newly awarded distributorship, giving as the reason that it "had to go along with Seagrams—the other side of the house—on their sales policy" (R. 40-41); that Seagram and Calvert, in February, 1947, resumed shipments to other Indiana wholesalers when the latter filed new prices at the former O.P.A. level, but both continued to boycott petitioner, and, thereafter in 1947, both Seagram and Calvert continued their identical price policies by putting in force fair trade contracts, with identical price structures on their comparable brands, adopting as the minimum prices required to be charged by their customers the maximum prices insisted on in November, 1946.

Thus the evidence showed (i), an identical course of conduct, (ii) opportunity to have agreed thereon at conferences admittedly held, (iii), motive, in Seagram's need for enlisting aid in enforcing dictation of resale prices, and (iv), admissions by Calvert that it had "to go along with Seagram * * * on their sales policy." This quantum of proof of concerted action far exceeded that usually available in conspiracy actions, and in holding it insufficient, the court below invaded the historic province of the jury and adopted a standard of proof so rigid that, if approved, it would be virtually impossible to prove a conspiracy in restraint of trade. Further, the court below committed a palpable error of law in holding that Calvert's announced reasons for its refusal to deal with petitioner, even though not objected to nor sought to be limited by Seagram, was not proof of combination against Seagram.

II. The Court of Appeals erred in holding that the conspiracy to fix resale prices found by the jury did not violate the antitrust laws, because it was a combination only to fix maximum prices for the resale by wholesalers of respondents' liquor. (182 F. 2d at pp. 235-6, R. 411-12.)

Even assuming that the only agreement shown between respondents was one to fix and coerce the adoption of maximum resale prices, the Seventh Circuit erred in holding such a combination to be lawful. The Court disregarded as *dicta* what it described as the "strong and exclusive language with reference to any agreement which tampers with the price structure," used by this Court in *United States* v. *Socony-Vacuum Oil Co., Inc., et al.*, 310 U. S. 150, and put a crippling constriction on the following principles announced in that case (p. 222-3):

> "An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price fixing was used * * * a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."

The sanction of approval given by the court below to maximum price agreements applies not only generally to agreements among sellers upon their own prices but, in the case at bar, applies to the resale prices of their customers—which means that competing sellers would be free to agree not only upon resale prices but upon the means to enforce their adoption by the separate customers of each. Such a price-fixing combination not only involves the mutually agreed restraint of the sellers but also a restraint upon "the freedom of trade on the part of dealers who own what they sell" (*Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, 407-8), "designed to take away dealers' control of their own affairs" (*United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85, 100). This freedom of trade

of dealers and the right to control their own affairs comes under the aegis of the doctrine that price-fixing is illegal *per se.*

Wholesalers and other distributors in the vertical line of commerce in a commodity have no means of protecting themselves against changing or rising costs if dominant competing producers are free to combine in order to fix and coerce absolute or maximum resale prices. The basis of the Seventh Circuit's contrary holding is that higher prices are always a detriment to the competitive system; which is to say that the survival of independent merchants is not essential in a healthy merchandising structure, and that absentee control by centralized combinations with power to regulate the profits of local businesses is in the public interest. Even if the Court's economic diction were true that trade is always "impaired by high prices and the ability to increase prices" (R. 410), under our system only a public and not a private O.P.A. could be vested with the power to set maximum prices. (See: *Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 537.)

The blanket proscription of price-fixing is grounded on recognition that those "who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since these prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions" (*U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. at p. 843). In this case, there is substantial evidence, disregarded by the court below, that the maximum resale prices prescribed by respondents in October 1946 were in fact absolute prices. Supplies were then scarce and fixing a ceiling on resale prices was equivalent to fixing the floor. But soon after respondents resumed shipments to Indiana in 1947, they filed fair trade contracts with all their customers, thereby perpetuating the former ceiling prices as minimum prices. Moreover, the prior coercion practiced in suspending shipments and canceling distributorships would itself have discouraged any deviation in price by the wholesalers, thus rendering illusory the freedom "to fix any prices within

the maximum limitation," cited by the court below. (R. 410.) The proof also showed that respondents had an established price for years (R. 232), and that they wished to maintain that price structure (R. 231). Upon this evidence which sustained the jury's finding of a conspiracy to fix resale prices, the limitation sought to be placed by the court below upon the "strong and exclusive" language of this Court in the *Socony-Vacuum* case was particularly unwarranted.

III. This Court granted certiorari, without limitation, on the questions presented and errors assigned in the petition for certiorari. Such questions and assigned errors included all of the issues expressly decided by the Court of Appeals. A decision by this Court on such questions, if error should be found, would not dispose of this litigation and would leave undecided one question of public importance, independently warranting review by this Court. The opinion of the Court of Appeals in dicta decided this issue (relating to a defense based on an alleged violation by plaintiff of the antitrust laws).

This Court has the power to decide the entire case upon the record before it (*Story Parchment Co.* v. *Patterson Parchment Paper Co.*, 282 U. S. 555) and we ask that the Court exercise that power to decide this important public question and, by disposing of other minor assignments of error, terminate this litigation by reinstatement of the judgment of the District Court.

Respondents assigned error by the District Court in the following portion of its instructions to the jury:

> "I might say at this time that it is no defense to this action, even though the plaintiff and the other wholesalers entered into a conspiracy among themselves, that would be no defense to this action, if the defendants entered into the conspiracy charged in the complaint." (R. 264.)

In effect, the instruction tells the jury:

1. That the motivation of defendants who have combined to fix prices is immaterial. Here the claim was that the respondents, believing that petitioner had conspired with other wholesalers, had the right and the duty to combine and conspire to police the industry and to refuse to sell to those who were not obeying the antitrust laws.

2. That a treble damage action is not barred by the equitable doctrine of "clean hands," if the plaintiff is shown to be engaged in an independent conspiracy with others, not parties to the action, to violate the antitrust laws in connection with the product which he is purchasing from the defendants.

The instruction was correct as a matter of law on both points. The contrary view on the first point, which the Court of Appeals approved, would mean that competing manufacturers or producers could successfully defend against antitrust violations by asserting that they were policing the distribution of their products against violations of the antitrust laws and, therefore, could with impunity conspire to the injury of their victims. The police power under the antitrust laws is vested in administrative agencies and the courts, and such power cannot be delegated to combinations of private individuals, so as to permit them to cloak their illegal actions and the injury caused thereby under an immunity of law. The same historic defense of beneficent purpose has been repeatedly considered immaterial by this Court.

As to the second point, both on principle and precedent, it is clear that the doctrine of "clean hands" does not place a plaintiff who violates the antitrust laws beyond the pale of the legal protection afforded to him by such laws. *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, *Wilder Mfg. Co.*

v. *Corn Products Refining Co.*, 236 U. S. 173, *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S. 546.

The additional assignments of error relate to other instructions and admission of evidence. The short discussion of these assigments herein contained shows both that they are groundless and of insufficient importance to constitute reversible error.

ARGUMENT

I

THE COURT OF APPEALS ERRED IN REVERSING THE JUDGMENT OF THE DISTRICT COURT ON THE GROUND THAT THERE WAS NOT SUFFICIENT EVIDENCE OF COMBINATION AND CONSPIRACY ON THE PART OF THE DEFENDANTS TO GO TO THE JURY.

The finding implicit in the verdict of the jury that the defendants conspired to fix the resale prices of their products was supported by substantial evidence and the court below erred in holding to the contrary. The ultimate issue of fact which was left to the jury by the instructions of the District Court was whether or not the defendants had entered into a contract or conspiracy to fix the resale prices of their products and whether plaintiff was damaged by this conspiracy (R. 267). The jury returned a general verdict for plaintiff (R. 279).

It is difficult to imagine a case involving the modern business community where proof of conspiracy could be more conclusive. As stated above, the record shows, in brief:

(1) That there was close corporate affiliation between the Seagram and Calvert companies, including stock ownership of Calvert by Seagram (Indiana);

(2) That Seagram determined to fix resale prices at the previous O. P. A. levels and punished the peti-

tioner for refusing to adhere to its policy by suspending shipments;

(3) That Calvert, admittedly a Seagram competitor, and aware of the Seagram policy, determined to expand its distribution in Indiana through petitioner, without any control over resale prices;

(4) That conferences between officials of Calvert and of Seagram were held, and the question of supplying products to petitioner was discussed;

(5) That Calvert over-night reversed its attitude toward the petitioner and refused shipments, despite repeated prior statements to petitioner that it wanted to "get into the Indiana market in a big way," through petitioner, and despite its previous disinterest in petitioner's prices and repeated assurances that it would fulfill its commitments;

(6) That Seagram and Calvert (but no other distiller) (R. 193, 196) made identical resale price demands on Indiana wholesalers, and enforced such demands by identical coercion in the form of suspension of shipments and cancellation of distributorships;

(7) That Seagram and Calvert in an identical manner terminated petitioner's distributorship, despite petitioner's long and excellent record of service for Seagram and Calvert's arduous efforts, newly successful, to obtain petitioner as a distributor;

(8) That Calvert told the petitioner that the reason for its withdrawal from the arrangement was that it "had to go along with Seagrams—the other side of the house—on their sales policy";

(9) That Seagram and Calvert concurrently resumed shipments to Indiana wholesalers, other than petitioner, when new price filings were made in February 1947, both, however, continuing to boycott petitioner; and

(10) That, thereafter, Seagram and Calvert continued their identical price policies by executing and filing fair trade contracts, with identical price structures on comparable brands.

In ignoring the above facts and the inferences which the jury drew from them, the Seventh Circuit in the opinion below adopted a standard of proof so rigid that, if followed, it would become virtually impossible to prove the existence of a conspiracy in restraint of trade. In so doing, the court below also disregarded the established law with respect to setting aside jury verdicts.

An appellate court should reverse a jury verdict only where it is "clearly erroneous". In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 375, it was said:

> "And, although there was no direct evidence—as there could not well be—that the defendant's refusal to sell to the plaintiff was in pursuance of a purpose to monopolize, we think that the circumstances disclosed in the evidence sufficiently tended to indicate such purposes, as a matter of just and reasonable inference, to warrant the submission of this question to the jury . . . And the weight of the evidence being in such case exclusively a question for the jury, its determination is conclusive upon this question of fact."

The Court of Appeals correctly stated the standard by which a jury verdict should be tested on appeal, saying (R. 402):

> "* * * that it (the proof) must be considered in a light most favorable to the plaintiff, and that the plaintiff is entitled to all reasonable inferences which may be deduced therefrom."

Professing to apply such standard, the Court of Appeals concluded from its interpretation of the evidence upon which the jury verdict was based that (R. 406):

"The most the proof shows is that Calvert for reasons of its own decided to abandon its policy and to follow that in practice by its competitor. There is not a scintilla of proof that this shift in the position of Calvert was at the request, invitation, demand or suggestion of Seagram."

The only logical inference—and the one which the verdict of the jury found—is that at the conferences admitted and sworn to by respondents, it was agreed between Seagram and Calvert to fix resale prices at the previous O.P.A. level and to put such agreement into effect by joint coercive force.

If evidence of this character is as a matter of law not sufficient to prove a conspiracy in restraint of trade, then the former legal standards for proof of a violation of the Sherman Act have been abandoned. In *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U. S. 600, 607, this Court said:

"It is elementary, however, that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done."

Certainly this unchallenged evidence established an overall pattern of the combination or conspiracy which the jury found to exist. From the things actually done by the respondents four elements of proof, namely identical course of action, opportunity, motive and admission are clearly present. Thus, the evidence, said by the Court of Appeals not to furnish a "scintilla of proof" of concerted action, shows:

(1) An identical course of conduct on the part of the respondents to force upon petitioner an identical price structure,

(2) Ample proof of opportunity by the respondents to have agreed, including the conferences admittedly

held by the respondents, together with the fact of their corporate affiliation,[3]

(3) An amply sufficient motive for combined action, since the effectiveness of Seagram's coercive tactics would have been seriously impaired without Calvert's joinder, and Calvert, pursuing an independent course, undoubtedly would have enjoyed a part of Seagram's normal market in Indiana, and

(4) The admissions of Calvert, regretfully made to petitioner, that "we have to go along with Seagram" * * * "the other side of the house" * * * "on their sales policy." (R. 40-41)

This Calvert admission alone, we submit, along with the proof of identical action, was amply sufficient to take the issue of conspiracy to the jury. Indeed the Court of Appeals did not hold otherwise. Rather, the court committed a palpable error in holding that Calvert's explanation was not proof against Seagram, because inadmissible under the hearsay rule. The court also held that the inference of conspiracy which could be drawn from Calvert's conduct was likewise not binding on Seagram. No objection was made by Seagram to the introduction of this evidence, no request was made for any limiting instruction by the trial court and no contention was made by respondent involving the competency of this proof in the Court of Appeals. Presumably no such objection was made because Calvert's statements and conduct were unquestionably admissible under the co-conspirators' rule.[4]

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[3] The Seagram companies occupy space on the south side of the Chrysler Building in New York City; Calvert has space on the north side of the same floors. (R. 41)

[4] *Winchester & Partridge Mfg. Co.* v. *Creary*, 116 U. S. 161, *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *National Ben Franklin Fire Ins. Co.* v. *Stuckey*, 79 F. 2d 631 (5th Cir., 1935);

In any event, Calvert's admissions, even if hearsay, having been received without objection from any of the respondents, must be considered as competent evidence. *Diaz* v. *United States*, 223 U. S. 442, 450; *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U. S. 1, 9; *Spiller* v. *Atchison, T. & Santa Fe R. Co.*, 253 U. S. 117. In the last named case, this Court said with respect to hearsay evidence, at p. 130:

> "Even in a court of law, if evidence of this kind is admitted without objection, it is to be considered, and accorded its natural probative effect, as if it were in law admissible."

The four elements of proof considered by the jury upon the issue of conspiracy, namely, identical course of action, opportunity, motive and admission, far exceeded the type of proof of conspiracy which is normally available. In *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 221, the Court said:

> "As is usual in cases of alleged unlawful agreements to restrain commerce, the government is without the aid of direct testimony that the distributors entered into any agreement with each other to impose the restrictions upon subsequent-run exhibitors. In order to establish agreement it is compelled to rely on inferences drawn from the course of conduct of the alleged conspirators.
>
> "The trial court drew the inference of agreement from the nature of the proposals made on behalf of Interstate and Consolidated; from the manner in which they

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United States v. *Vehicular Parking*, 52 F. Supp. 751 (D. Del., 1943).

In the *Hitchman* case, it was said:

> "In order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves."

were made; from the substantial unanimity of action taken upon them by the distributors * * *."

Similarly, in *American Tobacco Co., et al.* v. *United States*, 328 U. S. 781, 809-10, this Court said:

> "The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealings or other circumstances as well as in any exchange of words. U. S. v. Schrader's Son, 252 U. S. 85, 40 S. Ct. 251, 64 L. Ed. 471. Where the circumstances are such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."

It follows that the court below, by ignoring the historic function of the jury in determining issues of fact and by rejecting the inferences which could be drawn from the conduct of the parties and from the circumstances proved, arrived at the erroneous conclusion that no conspiracy existed among the respondents. It was for the jury to decide whether the defendants conspired and the jury so found on substantial evidence. That was the type of conclusion concerning which this Court in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 566, said:

> "But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact finding body. * * * the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."

II

THE COURT ERRED IN HOLDING THAT THE CONSPIRACY TO FIX RESALE PRICES FOUND BY THE JURY DID NOT VIOLATE THE ANTITRUST LAWS BECAUSE IT WAS A COMBINATION ONLY TO FIX MAXIMUM PRICES FOR THE RESALE OF ITS LIQUOR BY WHOLESALERS.

In ruling that the record here disclosed no restraint of trade, the court below committed two errors. The court erred as a matter of law in holding that a conspiracy to fix maximum prices is not a violation of Section 1 of the Sherman Act. The court further erred as a matter of law, in upsetting the jury verdict based on substantial evidence that the defendants fixed the absolute resale price for their products, and in holding that the defendants were merely fixing maximum resale prices.

The declaration of the Seventh Circuit holding lawful a combination to fix maximum resale prices is a novel and unwarranted restriction of the doctrine in *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, which holds that all price-fixing agreements are unlawful *per se.*

To permit manufacturers or other sellers in interstate commerce, by agreement and by combination, to fix and coerce maximum price levels would open the door anew, as respects price agreements, to controversy over the question whether the tampering by competitors with price structures is reasonable or unreasonable, a question which has been deemed irrelevant since *United States* v. *Trenton Potteries Co.,* 273 U. S. 392.

In *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, it was pointed out (p. 218) that for over forty (now fifty) years "this Court has consistently and without deviation adhered to the principle that price agreements are unlawful per se," (not necessarily because of their immediate adverse effect but because of their "actual or potential threat to the cen-

tral nervous system of the economy," note, p. 224).[5] The Court said, in reversing the Seventh Circuit:[6]

> "An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used . . . a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." (at 222-23)

This blanket proscription of price-fixing agreements is grounded particularly on a recognition of the fact that those "who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since these prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions." (p. 221) It is but a corollary that maximum prices fixed today may

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[5] See:

United States v. Trans-Missouri Freight Assn., 166 U. S. 290.
U. S. v. Joint-Traffic Association, 171 U. S. 505.
Addyston Pipe and Steel Co. v. United States, 175 U. S. 211.
Bobbs-Merrill Company v. Straus et al., 210 U. S. 339.
Standard Sanitary Manufacturing Co. v. United States, 226 U. S. 20.
Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U. S. 600.
United States v. A. Schrader's Son, Inc., 252 U. S. 85.
Frey and Son, Inc. v. Cudahy Packing Company, 256 U. S. 208.
Maple Flooring Manufacturers' Assn. v. United States, 268 U. S. 563.
U. S. v. Univis Lens Co. Inc. et al., 316 U. S. 241.
U. S. v. Bausch and Lomb Optical Co. et al., 321 U. S. 707.
U. S. v. Paramount Pictures, Inc. et al., 334 U. S. 131.

[6] The Seventh Circuit Court of Appeals in its opinion in the *Socony-Vacuum* case (105 F. 2d 809, 831) stated that there had been too much importance attached to the terms "*price fixing*" and "*price affecting*"; that the true test in determining whether an agreement was unlawful *per se* was its effect upon competition—if competition was suppressed or destroyed (or power to destroy exists), the agreement was illegal *per se*, if not, then the reasonableness of the restraint, whether or not "undue", should be determined (p. 831).

become minimum prices tomorrow; *and in the case at bar they did become so* when the respondents shortly after the successful coercion of downward revision of resale prices to the abandoned O.P.A. level, prescribed the identical resale prices as the *minimum* resale prices for their goods. (R. 104-105)

For still another reason, the crippling constriction by the Court of Appeals of the principles announced by this Court in *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, constitutes a damaging limitation of ~~Section 1~~ of the Sherman Act. Such constriction is applied by the Court of Appeals to the fixing of resale prices rather than to the fixing of prices to be obtained by the conspirators themselves. Resale price agreements between sellers involve not only agreement upon prices but, of necessity, agreement upon the means to persuade or, as here, to force adoption of the agreed price by the separate customers of each.

Therefore, wholly apart from the question whether the language of this Court in *U. S.* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, admits of valid agreements under the Sherman Act between sellers fixing ceilings for their *own* prices, the Court of Appeals departed from the rationale of the resale price cases *in holding that competing sellers legally may combine to refuse to sell their goods to a customer of either or both* because he will not submit to their combined dictation of what *his* resale prices should be (whether maximum or minimum). Such a price-fixing combination, as here, of necessity restrains the "freedom of trade on the part of dealers who own what they sell" (*Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U. S. 373, 407-8). This agreement on price and means of coercion was clearly "designed to take away dealers' control of their own affairs" (*United States* v. *A. Schrader's Son, Inc.,* 252 U. S. 85, 100), and was but the prelude to absolute control of price by illegal use of Fair Trade contracts. The resale price cases expressly ban such restraints which are but concrete illustrations of the natural consequences which caused this

Court in *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, to proscribe as illegal *per se* any tampering with price structures.

The validity of these principles is quite apparent upon an examination of this record. Pious declarations of a determination to "hold the price line" on the part of large producers who are dominant in the market must be examined carefully. Such declarations inevitably occur in a period of rising costs. The compulsion on the part of such producers is to devise methods to protect themselves against increased costs by means other than by raising prices. This is frequently done by cheapening the quality of the product or by "upgrading".

Both of these devices appear in this case. First, although Seagram claimed to be "holding the price line", it cheapened the quality of its product—thus receiving a price pegged by Seagram and Calvert together for less valuable liquor. This was done by adding a greater proportion of younger whiskies to the blend (R. 211-12). The second method used by Seagram to protect its profits under ceiling prices was to concentrate on more expensive brands (e.g., 7-Crown) while withdrawing from sale the cheaper ones (i.e., Kessler and 5-Crown, R. 33, 291).

The wholesaler, on the other hand, cannot similarly protect himself against rising costs in the case of fixed resale prices. He cannot decide what product the dominant producers will make and sell. He must take what he is given. The product he sells is not of his own manufacture. The only way in which he can operate his business at a fair profit is to decide for himself, freely and independently, what prices he is to charge and in that he is controlled both by the goodwill of his customers and the competitive influences of the local market. When dominant producers whose products the wholesaler handles combine to determine the wholesaler's price policy—whether maximum, absolute, or minimum—he no longer enjoys the "freedom of trade on the part of dealers who own what they sell."

(*Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373, 407-8). We submit that the protection of this freedom is within the aegis of the doctrine that price fixing is illegal *per se*.

The basis for the Seventh Circuit's belief that a conspiracy to fix maximum prices is not a violation of the anti-trust laws is found in the following naive economic dictum:

> "Bonafide competition results in benefit to the consumer in the form of lower prices. Higher prices are a detriment to the consumer and are no aid to the competitive system . . . Trade, like competition, is impaired by high prices and the ability to increase prices." (R. 410)

That is to say that the opportunity of distributors to make profits is unimportant in the competitive system; that the survival of independent businessmen and merchants who depend upon large centralized suppliers is not essential in maintaining a healthy merchandizing structure, and that a system of absentee control of businesses in smaller communities by a centralized combination with power to regulate how much money such businesses can make is beneficial to our economy.[7] If the court's economic dictum

[7] General Schwengel, the President of Seagram (Indiana) advocated this theory of absentee paternalism in his testimony (R. 256):

> "The Court: I say, the thing I can't quite understand is why it was any of your business what they charged for liquor after you got your price out of it.
>
> "The Witness: Well, in today's merchandising it is the manufacturer's business. He has a very serious obligation to the public. For example, under fair trade laws today the manufacturer feels that prices will gradually be more favorable to the public. Other economists may say the fair trade laws increase the price to the public. More and more the manufacturer has an obligation to the public at which his commodity is sold and every manufacturer seeks to deliver that commodity at the most favorable price to his public, taking into consideration a fair and liveable profit to the wholesaler and a fair and liveable profit to the retailer and the markups are just based on the discussion, not maybe for the record, the markups in the distilling business are very fair because we

were true we should enact a perpetual O.P.A., because certainly private agencies cannot be delegated the power to control competition. As Chief Justice Hughes said in the *Schechter* case:

> "The government urges that the codes will 'consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems.' Instances are cited in which Congress has availed itself of such assistance; as, e.g., in the exercise of its authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims, or, in matters of a more or less technical nature, as in designating the standard height of drawbars. But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title I? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress." (*Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495, 537)[8].

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feel that the more money a wholesaler makes, a retailer makes, and a tavern keeper makes, the more he will observe the moral code, the more he will pay attention and run his business properly. The minute he loses money he goes off the reservation."

[8] See the dissenting opinion of Mr. Justice Douglas in *U. S.* v. *Columbia Steel Co.*, 334 U. S. 495, 536, where, in a different context it was said:

> "For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy.'

The Evidence Establishes a Conspiracy to Fix Absolute or Actual Resale Prices.

The Seventh Circuit Court of Appeals has here held that none of the interdictions contained in the opinion of this Court in the *Socony-Vacuum* case were applicable because:

> "The defendants, as the O.P.A. had previously done, announced a maximum price policy above which their products could not be resold. This was the sole restriction which they sought to place upon the wholesalers who were all accorded the same treatment. No discrimination in this respect was directed at the plaintiff or any other wholesaler. The defendants fixed no price at which their products could or must be resold. The wholesaler was free to fix any price which it saw fit within the maximum limitation. There was no impairment upon their ability to meet a competitor's price or to sell for less. Neither were they required to sell Seagram and Calvert products at the same price. (R. 410)
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> * * *
>
> "* * * if any agreement was shown it was one to prevent an increase in the resale price." (R. 411)

This erroneous hypothesis to which the Court of Appeals held the legal principles announced by this Court in the *Socony-Vacuum* case did not apply, disregards substantial evidence upon which the jury found, under appropriate instructions of the Court, the existence of a conspiracy to fix absolute resale prices.[9]

There is substantial evidence in the record to support this finding in the following:

Seagram's Vice-President Fischel in his original wire announcing the Seagram policy stated that they had decided to "maintain former O. P. A. prices on all brands" (not as the maximum, but as *the* price), and he asked immediate assurances that this be done (R. 393). Reznik of Calvert

[9] The trial court specifically refrained from mentioning maximum prices in his instructions (R. 271)

said that they urged wholesalers to keep *the same* price (R. 244). Schwengel of Seagram insisted on sales at *no other price than the O. P. A. price* (R. 68). At the meeting in Chicago, February 3, 1947, Fischel of Seagram wanted to talk only with those Indiana wholesalers who had filed new prices with the Indiana Alcoholic Beverage Commission (R. 84). Wachtel stated that he refused to ship products until the Indiana wholesalers came back to "the price (he) wanted them to charge" (R. 232).

The record also shows with respect to the asserted freedom of the wholesalers to compete that:

1. In November, 1946, both Seagram and Calvert were allocating their products to their customers.

2. Beginning in 1947 there was a general decline in the liquor business, amounting over the next $2\frac{1}{4}$ years to approximately one-third. (R. 140)

3. Calvert (Sales) eliminated its war-time allocation system in March, 1947. Seagram (Sales) increased its allocations in April, 1947, and in July or August, 1947, eliminated the allocation system.

4. Both Calvert and Seagram filed fair trade contracts in July, 1947, establishing identical price structures on their comparable principal brands.

It is but a reasonable conclusion from such evidence that any freedom of the wholesalers to compete on any price under the ceiling was illusory. Since supplies of liquor were scarce in 1946, obviously no compulsion by respondents was necessary to protect their identical price structures as minimums. Fixing the ceiling was tantamount to fixing the floor. But as soon as supplies became more plentiful, respondents executed and filed fair trade contracts perpetuating their former maximum prices as minima. Moreover, it is obvious that the joint coercive force applied by the respondents by their embargo on ship-

ments to Indiana from November, 1946 to February of 1947 would effectively discourage any deviation from their established price structures, even without the later legal compulsion of the fair trade contracts.

The case went to the jury on the issue of whether the respondents conspired to fix the resale prices of their products and the jury verdict in favor of the petitioner constitutes a finding that the respondents so conspired. The Court of Appeals, ignoring the substantial evidence summarized above, confined its search for the substance of the conspiracy or agreement to the telegram (announcing Seagram's decision to "maintain former O. P. A. prices," R. 393) sent by Seagram to all of its distributors throughout the United States and said:

> "Thus this announced policy, together with the refusal on the part of defendants to supply liquor to wholesalers who refused to recognize such policy, embraces every element of the conspiracy, agreement or concerted activity claimed to have been proven." (R. 409)

The opinion of the Court of Appeals does not even suggest that a conspiracy between the respondents to fix an absolute resale price, if found, would be legal under the *Socony-Vacuum* case. The verdict of the jury, under the instructions of the Court, found such a conspiracy and the verdict was amply supported by the evidence.

III

THE OTHER ASSIGNMENTS OF ERROR ON WHICH THE COURT RULED BY DICTA, OR DID NOT DISCUSS, FURNISH NO GROUND FOR REVERSING THE JUDGMENT OF THE DISTRICT COURT AND THE VERDICT AND JUDGMENT SHOULD THEREFORE BE REINSTATED.

In the statement of the questions involved, we have asked the Court to consider the questions ruled upon by dicta or not discussed by the Court of Appeals, and which there-

fore could not be referred to in the petition for certiorari. In *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U. S. 555, an antitrust action, the Court, *sua sponte*, examined the assignments of error not decided by the Circuit Court and affirmed the judgment of the District Court. We respectfully ask the Court for the reasons above assigned (*supra*, p. 2) to reverse the judgment of the Circuit Court and to affirm the judgment of the District Court. Since the remaining assignments of error present only law questions, one of which is an important question in the judicial administration of the antitrust laws, and since respondents will have full opportunity to present their contentions, there is ample basis for serving the desirable end of concluding this litigation. We ask, therefore, for final judgment on these additional assignments.

The *Story Parchment* case goes much further than we ask the Court to go here. That case was also a treble damage action brought under the antitrust laws where the jury brought in a verdict for plaintiff. On appeal to the circuit court, 37 F. (2d) 537 (1st Cir. 1930), the judgment was vacated with directions to enter judgment for the defendants on the sole ground that the plaintiff had not sustained the burden of proving recoverable damages.

Eight other assignments of error were urged before the circuit court but were not discussed. These questions were neither argued nor briefed before the Supreme Court. The Court, however, considered all of them and thereafter reinstated the jury verdict.[10]

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[10] There have been other cases involving the antitrust laws in which the Supreme Court has directly affirmed the District Court's judgment in favor of plaintiff after a reversal by the Circuit Court.

See:

Bigelow v. *RKO Radio Pictures*, 327 U. S. 251 (in which the Circuit Court reversed on the sole ground that damages had not been adequately proven);

Thomsen v. *Cayser*, 243 U. S. 66 (in which the Circuit Court reversed on the sole ground that the restraint was not "unreasonable").

(i) *The assignment that the court erred in instructing that it was no defense to this action even though plaintiff and other wholesalers entered into a separate and independent conspiracy among themselves to fix prices.*

Though this assignment of error[11] was not made a distinct ground for reversal by the court below, nevertheless the opinion clearly says by way of dicta that as a matter of law a separate conspiracy between the plaintiff and other wholesalers would be a defense to the conspiracy charged in the complaint. The court said:

> "In fact, defendants pleaded this situation as a defense and it was assigned by them as a reason, particularly by Seagram, for their refusal to supply the wholesalers with liquor. That they had a concrete reason for being concerned is shown by the fact that some of the instant defendants had been convicted and penalized in a criminal prosecution under circumstances much akin to those of the instant situation. See United States v. Frankfort Distillers, Inc., 324 U. S. 293. If they had sold to the wholesalers with knowledge that the latter were engaged in a price fixing conspiracy of their own, defendants might have found themselves impaled on one prong of a two-horned dilemma." (R. 407-8; 182 F. 2d 233.)

The principle expressed in the above quotation would, if the case were remanded, require the Court of Appeals to grant a new trial on the issue of the alleged wholesalers' conspiracy.

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[11] Defendants' Point 4 relied on in the appeal below reads as follows:

> "The Court erred in so much of his instructions to the jury as stated: 'that it is no defense to this action even though the plaintiff and the other wholesalers entered into a conspiracy among themselves,' and that that would be no defense if the defendants were guilty of the conspiracy charged in the complaint, to which portion of the Court's instructions exception was taken." (R. 362)

The instruction reads as follows:

"I might say at this time that it is no defense to this action, even though the plaintiff and the other wholesalers entered into a conspiracy among themselves, that would be no defense to this action, if the defendants entered into the conspiracy charged in the complaint." (R. 264.)

In effect, the instruction tells the jury:

1. That the motivation of defendants who have combined to fix prices is immaterial. Here the claim was that the respondents, believing that petitioner had conspired with other wholesalers, had the right and the duty to combine and conspire to police the industry and to refuse to sell to those who were not obeying the antitrust laws.

2. That a treble damage action is not barred by the equitable doctrine of "clean hands," if the plaintiff is shown to be engaged in an independent conspiracy with others, not parties to the action, to violate the antitrust laws in connection with the product which he is purchasing from the defendants.

The statement in the opinion of the court below on this point raises an important question of law which should be settled here to avoid a new trial. It makes the alleged separate conspiracy of the petitioner a defense to the conspiracy charged in the complaint.

The court has indicated, as a matter of law, that if the defendants entertained the belief that they might become involved in an antitrust violation if they sold to petitioner,[12] they could for that reason combine and conspire to boycott the petitioner. The court here confuses the action

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[12] The respondents claimed fear of a repetition of an indictment like that considered by this court in *U. S. v. Frankfort Distillers, Inc.*, 324 U. S. 293, was obviously a sham defense since that decision required active participation by the respondents.

which an individual could take with his right to combine with others. Certainly if any of the respondents thought it dangerous to become involved with petitioner, it could separately decline to deal with petitioner. The law is that any individual may select his own customers. *United States* v. *Colgate & Co.*, 250 U. S. 300, 307. This rule gives all the protection that any seller, acting singly, needs to avoid being involved with undesirable people. But this doctrine certainly affords no possible justification for the respondents having combined with each other to withhold shipments, thereby accomplishing a restraint of trade.

Even if it were true that the reason the respondents combined to refuse shipments to petitioner was that they had learned petitioner was conspiring with other wholesalers to violate the antitrust laws, this would constitute no justification for the respondents having restrained trade and in the process injuring petitioner.

The basis of the defense raised by this assignment could only be that respondents, with impunity, may combine in restraint of trade in order to see to it that the antitrust laws are obeyed in the distribution of liquor by wholesalers. Such police power cannot be exercised by a combination of private individuals. To permit them to do so would be to delegate the authority of the government to private parties and to deprive even suspected persons of the protection of the antitrust laws. Nor would it make any difference if the suspected persons could actually be proven guilty of violation of the antitrust laws in some independent conspiracy. For example, we may take a case recently decided by this Court. The Schine motion picture circuit has been held to have violated the antitrust laws (*Schine Chain Theatres* v. *United States*, 334 U. S. 110). Suppose during the course of the trial a combination of motion picture producers in restraint of trade had deprived the Schine Circuit of screen plays, driven it out of business, and caused it irreparable damage. Certainly such a combination could not successfully defend a suit for treble damages because of a finding

of violation of the Sherman Act in the government's suit.

The instruction takes away no rights from the defendants if, as a matter of fact, they have been damaged by some alleged conspiracy between plaintiff and other wholesalers. If such damage could be shown, a suit could be brought against the parties to that conspiracy.

The defense which this assignment of error brings forward is similar to defenses which have been urged over and over again before this Court and each time have been rejected. In the *Socony-Vacuum* case, 310 U. S. 150, it was argued that a combination to put a floor under prices was justified since it preserved competition in the industry by protecting the small concerns which otherwise would not survive. In the *Univis Lens* case, 316 U. S. 241, the restraint of trade charged was alleged by the defendants to be justified since it protected the consumer of spectacles from inferior goods which would presumably be sold by price cutters. In the *Ethyl Gasoline* case, 307 U. S. 436, it was argued that the restraint of trade and the withholding of oil products from certain jobbers was justified in order to protect the public against the careless use of poisonous ethyl gas. In the *Fashion Guild* case, 312 U. S. 457, the restraint of trade was claimed to be justified because the defendants had a right to defend against style piracy.[13]

In each of these cases, the asserted justification, based on claimed beneficent purposes, was held to present no valid defense and to be wholly immaterial. The test applied has been rather whether the conspiring defendants in fact effected a restraint of trade.

The power to penalize for engaging in a conspiracy to restrain trade cannot be delegated to a private combination. This is the function of the Department of Justice

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[13] *U. S.* v. *Socony-Vacuum Oil Company*, 310 U. S. 150;
U. S. v. *Univis Lens*, 316 U. S. 241;
Ethyl Gasoline Corp. v. *U. S.*, 309 U. S. 436;
Fashion Originators' Guild of America v. *F. T. C.*, 312 U. S. 457.

and the courts. To hold otherwise would be to invite the destruction of the business of any person who is accused of having violated the antitrust laws.

The clean hands doctrine. In the court below respondents relied, in support of this assignment of error, upon the case of *Maltz* v. *Sax,* 134 F. 2d 2 (7th Cir., 1943), to argue that petitioner did not come into court with clean hands and therefore could not recover. That case involved a conspiracy to interfere with plaintiff's manufacture of punchboards. The court did not hold plaintiff's business illegal but noted that the distribution of punchboards was at least against public policy. For that reason, the court said:

> "Plaintiff has no legal right in a business the conduct of which was gambling for which he may obtain protection either in an action at law or a suit in equity."

It followed that, of course, such a plaintiff could not invoke the protection of the antitrust laws nor, under the theory of the court, could the plaintiff invoke any legal protection.

The case, even if sound on the facts [which is doubtful], cannot conceivably apply to the case at bar unless it be held that the sale of liquor is against public policy and therefore quasi-illegal. This Court has repeatedly held that a violation of the antitrust laws does not put a plaintiff beyond the pale of legal protection.[14]

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[14] *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, *A. B. Small Co.* v. *Lamborn & Co.*, 267 U. S. 248, *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U. S. 173, *Connelly* v. *Union Sewer Pipe Co.*, 184 U. S. 546.

A violation of the antitrust laws has been held to be a valid defense only (i) in cases where the plaintiff and the defendant are *in pari delicto*, *Continental Wall Paper Co.* v. *Voight & Sons*, 212 U. S. 227, Cf. *Connecticut Importing Co.* v. *Frankfort Distilleries*, 101 F. 2d 79 (2 Cir., 1939) which doctrine respondents properly conceded below to be inapplicable, (ii) in cases where the judgment of the court will promote a violation of the antitrust laws by the plaintiff, *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 488,

Respondents' argument has been in effect rejected by this Court in *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U. S. 219. That was a treble damage action brought by a sugar beet grower in California against a sugar refiner. Plaintiff charged that the defendant together with other refiners had conspired to fix a uniform price for sugar beet purchases. It was pleaded in defense that by contracts signed with defendant and other refiners, the plaintiff had violated the antitrust laws and therefore had no standing to sue. The District Court upheld this defense, 64 F. Supp. 265, 267 (S. D. Cal., 1946), citing *Maltz* v. *Sax*, *supra*, in that connection, but the Circuit Court did not pass on the question, 159 F. 2d 71, 72 (9th Cir., 1947). The Supreme Court reversed, saying at 334 U. S. 219, 242-3:

> "It does not matter, contrary to respondents' view that growers contracting with the other two refiners may have been benefited rather than harmed, by the combination's effects, even if that result is assumed to have followed. It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of the legality and immunity of such a combination, in view of the statute's policy, is not that some others than the members of the combination have profited by its operation. It is rather whether the statute's policy has been violated in a manner to produce the general consequence it forbids for the public and the special consequences for particular individuals essential to the recovery of treble damages. * * *"

A doctrine which would put a businessman beyond the pale of legal protection because in the course of a legitimate business he is alleged to have engaged in an antitrust violation is supported neither by authority nor by common

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(iii) in cases where the plaintiff is held not entitled to assert an estoppel against contesting the validity of his patent, where the license fixes prices. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173.

sense. Certainly suppliers cannot with impunity conspire to put an end to his business.

(ii) The Additional Assignments of Error Before the Court of Appeals Are Groundless.

Before the Court of Appeals, the respondents assigned error on the failure of the trial court to give their requested instructions numbered 3 (R. 354) and 10 (R. 357). Such tendered instructions were intended to withdraw from the jury any issue of violation of Section 7 of the Clayton Act and to instruct the jury in terms of the so-called "single trader doctrine" embodied in *United States* v. *Colgate and Co.*, 250 U. S. 300. The instructions given by the Court required the jury to find a contract, combination or conspiracy to fix resale prices in violation of Section 1 of the Sherman Act. (R. 265-7.) Under such an instruction the jury clearly would not have been entitled to find for the petitioner on the basis of a violation of Section 7 of the Clayton Act, nor would the jury have been entitled to find for the petitioner if the respondents were individually exercising their rights as "single traders."

Respondents also asserted error based upon the admission of certain evidence. The District Court permitted the reading, over objection, of certain answers to interrogatories relating to the productive capacity and volume of sales of the respondents [R. 377-8 (Nos. 8, 9 and 10); R. 384 (No. 10); R. 388 (Nos. 31, 32); R. 390-91 (No. 7)]. This evidence was material to show the coercive power of the restraint imposed and, by demonstrating an increase in respondents' sales after 1946 despite a general decline in liquor business, was material to the issue of petitioner's damage.

The respondents also asserted error in the admission of testimony of a representative of Ernst & Ernst, certified public accountants and petitioner's auditors for twenty years, with respect to petitioner's volume of sales from 1946 through 1949 and with respect to the additional costs

and expenses, based on petitioner's experience, which petitioner would have incurred if its sales volume had not declined after 1946. (R. 126) The qualifications of the witness were freely conceded (R. 118), a showing was made of the voluminous character of petitioner's books (R. 124-125, 133-134) and the accuracy of the books was proved by the testimony of petitioner's auditor (R. 125.) Such testimony was admissible under Indiana decisions and was, therefore, properly admitted by the District Court. *Hollingsworth* v. *State*, 111 Ind. 289, 12 N. E. 490; *Chicago, St. L. and P. R. Co.* v. *Wolcott*, 141 Ind. 267, 39 N. E. 451; *Cleveland, C. C. & St. L. Ry. Co.* v. *Woodbury Glass Co.*, 70 Ind. App. 298, 120 N. E. 426, Rule 43(a) of "Rules of Civil Procedure for the United States District Courts." Petitioner twice expressed a willingness to bring the voluminous books to Court (R. 120, 133) and respondents gave only equivocal answers such as "possibly not" (R. 120) to the Court's inquiries whether the respondents insisted on production of the books (R. 120, 123.)

The final assignment related to the admission of opinion testimony of an expert witness, evaluating the relative contributions to petitioner's decline in sales volume of a general decline in business and the loss of the Seagram and Calvert lines. No objection was made by respondents on the basis of the lack of qualification of the witness to express an opinion (R. 139.) Where, as here, the fact of damage has been established, the evaluation given was clearly competent. See, *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 405, 408-409, cited in *Bigelow* v. *RKO Pictures*, 327 U. S. 251. See also, *William H. Rankin* v. *Associated Bill Posters of U. S.*, 42 F. (2d) 152, 156 (2nd Cir. 1930)

We think that this description of the additional assignments of error shows not only that they are groundless but also that, even if there were some possible merit to them, they are so trivial as not to constitute reversible error in view of the exhaustive evidence shown in the record.

CONCLUSION.

For the above reasons, we respectfully urge the Court to remand this cause to the District Court with instructions reinstating the jury verdict and the judgment there entered.

Respectfully submitted,

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